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Interpretation and Judgment

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INTRODUCTION

The major conclusions in Georgia Warnke’s illuminating Essay, *Law, Hermeneutics, and Public Debate* are persuasive,¹ but some that appear almost self-evident instead rest on controversial evaluative judgments. Many of my comments deal with these complexities, drawing from her book on interpretation and political theory² as well as her Essay. Other remarks develop subjects Warnke barely touches. My thoughts are, thus, some combination of clarification, supplementation, and disagreement.

My initial effort is to refine in just what senses interpretations of texts, social practices, and legal rules must speak to our concerns. I next explore how interpretations of legal texts that are applied in the present and are backed by coercive force differ from portrayals of literature; then I inquire how these differences bear on strategies of interpretation. I endorse Warnke’s rejection of a jurisprudence that focuses exclusively on original meaning, but I argue that this rejection cannot be grounded in general hermeneutic theory standing alone. Crucial moral and political judgments have to be made about allocating public functions. I then turn to Professor Warnke’s analysis of debate over great constitutional issues. I emphasize the multiple levels of legal analysis of a subject like abortion. The terms of public debate usually connect to the terms of legal analysis, but these forms of discourse are not identical. Relatedly, interpretation of relevant legal texts will not always track broader interpretations of social meaning. I next consider Professor Warnke’s account of legitimate

constitutional interpretation. I question some of her conclusions about illegitimate interpretations, and raise doubts about how far the two criteria she offers for legitimate interpretation apply to legal interpretation. Finally, I address the theme that there may be something like “the nature of the thing,” and offer brief suggestions about how a hermeneutic approach to interpretation like Warnke’s may fit with belief in natural law.

I. INTERPRETATION OF TEXTS AND HISTORICAL CONTEXT

Relying heavily on the work of Hans-Georg Gadamer and using the movie *Sense and Sensibility* as her major illustration, Professor Warnke offers a general theory about interpreting texts and social meanings. People understand things in light of historically contingent expectations and presumptions. Legal texts, like other texts, must be concretized at various moments of history in new ways. Interpretation and application inevitably reflect the perspectives and needs of those who do the interpreting. However, texts set limits on what are legitimate interpretations, and, as Gadamer says, “despite all the variety of moral ideas in the most different times and peoples . . . there is still something like the nature of the thing.”

For constitutional interpretation, Professor Warnke urges that we must understand provisions like the First Amendment and the Equal Protection Clause “in the light of our particular history,” including our history since these parts of the Constitution were adopted. The force of the “must” is epistemological rather than moral; that is, we are incapable of understanding constitutional texts in any other way, because of our own cultural and historical context. Because of significant differences among groups and individuals within a single broad culture at a time in history, we should also expect differences of interpretation among contemporaries.

Professor Warnke begins with Emma Thompson’s version of Jane Austen’s *Sense and Sensibility*, which “interprets [the text of the book] and does so from a particularly contemporary point of view.” The movie emphasizes Elinor Dashwood’s consciousness of her ethical duties toward others, a propriety that is not the same as conventionality. It treats her effort to maintain self-restraint as heroic, going so far as to include a scene not in the novel. Other interpretations of

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3. She talks of text-analogues such as actions, social practices, and norms. Warnke, supra note 1, at 396.
4. Id. at 396 (quoting HANS-GEORG GADAMER, TRUTH AND METHOD 320 (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. 1989) (1960)).
5. Id. at 401.
6. Id.
7. Id. at 396.
the book might be equally illuminating and legitimate; but that does not mean that "all sources of understanding are equally legitimate or that all interpretations are equally good."\(^8\)

Warnke leaves us with the distinct impression that a modern interpretation must speak to the sensitivities and concerns of a modern audience. She writes,

What Austen considers ethical propriety in general we recognize as a peculiarly English version of it and, therefore, although Thompson shows us we can learn from Austen's depiction of English propriety to question some of our emotional expressiveness and self-absorption, the way we understand this propriety necessarily differs from the way in which Austen understood it.\(^9\)

Just what is inevitable and what is conscious choice or resistible inclination? And how must an interpretation of a text speak to our concerns? I shall approach these crucial questions by steps.

Studies tell us how bees live. Our tendency to anthropomorphize may lead us to fantasize what being a queen bee or a drone is like; but scientific presentations are not cast in those terms. They do not tell us how bees see life. Do such studies speak to our concerns? Yes, in some senses. People are curious about their fellow creatures; these studies help satisfy that curiosity. And what scientists select for presentation is inevitably influenced by the degree of interest to human observers. Finally, readers may possibly learn something of value for their own lives. An imaginative reader may transfer a bee practice to corporate organization; others, less creative, may discover how to exterminate bees in their attics. But scientists are not trying to teach such lessons, and many readers will not draw any.

Studies of higher animals often use mental concepts like "want," "intend," "care," "pain"; and most of us believe that chimpanzees, for example, have at least some experiences that resemble ones that people have. Beyond speaking to our concerns in the limited ways that accounts of bees do, a study of chimpanzees may suggest mental and emotional states familiar to human beings. Still, a writer usually does not attempt to relate his study to a particular cultural consciousness or contemporary set of social problems.\(^10\)

For history and anthropology, the question of our contemporary concerns is sharper. What is inevitable? Anthropologists and

\(^8\) Id. at 400.
\(^9\) Id. at 398.
\(^10\) There are many exceptions. A study of territoriality in animals may be partly intended to help human beings understand and cope with their own "instincts" to dominate particular spaces.
historians can never shed the skin of their own cultures and stages in history. They will never see another culture as “it really is” or exactly as people within that culture see it. But beyond these inevitabilities lies a substantial range of choice. Students of other cultures can begin with categories and problems of their own societies and investigate “how those people do (or did) it.” Thus, Llewellyn and Hoebel looked at a particular Native American culture in “The Cheyenne Way” and identified their institutions of law and adjudication, hoping, in part, for lessons that might aid our law and adjudication. Alternatively, an anthropologist may attempt to understand a culture from the inside, as its participants see (or saw) it. His account tries to be as faithful as possible to their vision, telling modern readers of his society how people within another culture have lived. The author’s aim is not to teach particular lessons to readers, although his study is bound to present forms of social life that readers may not previously have understood. Only sometimes will readers consider unfamiliar forms as potentially relevant in their own lives. The life of the other culture may seem reprehensible or unacceptably “primitive”; if some features are attractive, these may seem too bizarre, or too closely linked to unattractive features, to become practical options. Any anthropological or historical account must speak to our concerns in some senses; but writers have a choice whether to focus more directly on what may aid our comprehension of problems and choices in our own social life.

This brings us to Jane Austen and Sense and Sensibility. Professor Warnke thinks Emma Thompson emphasizes an aspect of the book that has contemporary relevance, presenting Elinor in a way that allows us to identify with her and admire her self-restraint. According to Warnke, “[T]he way we understand this propriety necessarily differs from the way in which Austen understood it.”

Warnke goes on to speak of “the equal legitimacy of our understanding with Austen’s own of a text . . . .” She says, “Austen had no basis for contextualizing English self-restraint . . . . We cannot understand Austen the way she understood herself because history

12. I am assuming that in relevant respects, studies of one’s own culture at some earlier period are similar. For an interesting example of the portrayal of the social life of an earlier period, see Emmanuel Le Roy Ladurie, Montaillou: The Promised Land of Error (Barbara Bray trans., 1978) (depicting the life of a heretical community based on detailed accounts of the Inquisition).
13. Warnke, supra note 1, at 398.
14. Id.
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has proceeded . . . .”¹⁵ I am not quite sure how far Warnke means to take these observations.

Warnke refers to Austen’s understanding with some confidence. Of course, no one can replicate Austen’s understanding with precision. Beyond the general impossibility of fully knowing someone else’s mind stand substantial barriers of history and culture. Yet, Warnke does have an idea of how Austen’s vision differed from the more contemporary focus of Thompson. If Warnke’s perception is sound, we see that Thompson had a choice of presenting the novel to reflect Austen’s own vision as closely as possible or (putting it crudely) to respond to modern concerns.¹⁶

But can anyone present Austen’s own vision if we “cannot understand Austen the way she understood herself . . . .”? Part of the reason Warnke believes we “cannot understand Austen the way she understood herself” is that we are aware of a vast number of social possibilities that did not occur to Austen; she took for granted many things that we cannot take for granted. These passages reminded me of how we view our own childhoods. As children, we take for granted many things that we cannot take for granted as adults. I cannot now understand myself as a six year old the way I understood myself when I was six; but I do (through memory) have some understanding of how I then understood myself and the world around me. With help from others explaining Austen’s time and place, and with imaginative recollection of how we as children inhabited a narrower world of settled values, we might be able to approximate roughly how Austen saw things, even though we could never adopt her perspectives, because we know too much.

An interpreter of Austen’s book might decide to follow those cultural anthropologists who, insofar as they can, present forms of life as participants within the cultures understand them. A conceivable choice to display Austen’s own vision as fully as possible differs from viewing the novel self-consciously from the perspective of contemporary concerns.

How does Professor Warnke regard this possibility? She thinks, and I agree, that our “horizontal horizon” will affect our understanding of a text; but that does not settle whether attempted reconstruction of a previous historical understanding is one legitimate mode of interpretation. The passage in which Warnke speaks of the equal legitimacy of our understanding with Austen’s own does not focus on attempted contemporary reconstruction of Austen’s understanding.

¹⁵. Id.
¹⁶. I assume for this purpose that a moviemaker has a choice, even if an option is highly unlikely to be a commercial success.
On that topic, Warnke remarks, "An author's or a period's understanding of a text or itself cannot be the only legitimate understanding for a different age with different experiences." She also says, "To tie a legitimate understanding of Sense and Sensibility to its original audience's or Austen's own understanding would thus be a fruitless exercise in trying to get out of our own historical situation." If attempted reconstruction is really a "fruitless exercise," then far from being the only legitimate form of interpretation, it would not even be appropriate.

Contrary to what Warnke may believe, I think attempted reconstruction of the author's vision, as completely as possible, is an appropriate technique. The question remains whether it may not be preferable to all others. For performances of literary works, as for performances of symphonies written for old instruments, I think the answer to this question is simple. Various kinds of performances are valuable, including attempted reconstruction, and one need not choose any approach over all others as the best.

II. LEGAL (AND OTHER NORMATIVE) TEXTS REQUIRING CONTEMPORARY APPLICATION

A. Application to New Circumstances

Although legal interpretation bears resemblance to literary interpretation, it also differs significantly. Typically a legal norm is applied to present conditions. One can talk of how an aspect of Roman Law applied to a transaction in 200 C.E.; but usually a judge, or lawyer, or scholar asks how a legal rule or principle now applies. The ultimate question the judge faces is how the norm should now be applied. The nature of this question, combined with basic principles of legal interpretation, reveal two ways in which a legal standard is less self-contained than a literary work.

On occasion, older legal norms must be applied to circumstances that the norm-makers did not conceive. A striking example is electronic communication. If we ask how the Free Speech and Free Press Clauses apply to electronic media, we know that people in 1791

17. Warnke, supra note 1, at 398.
18. Id. at 398. She continues, "Moreover, it would limit the meaning of the text in an equally misconceived attempt to sever understanding and interpretation from applications." Id.
19. This is the drift of much she writes. However, in her book, WARNKE, supra note 2, at 120-21, 140, Warnke suggests that to understand the viewpoints of other cultures, one must try to immerse oneself in a kind of second first-language. If this is right, then we might also learn by trying to immerse ourselves in the perspectives of a previous historical age.
20. Warnke takes a similar position about the multiplicity of valid aesthetic interpretations. See id. at 31.
did not have a specific view about that. Of course, many particular legal problems were conceived, in the most obvious sense, by the lawmakers. The adopters of the Eighth Amendment believed capital punishment was constitutionally acceptable; the adopters of the Equal Protection Clause believed it did not guarantee women equal rights. These questions take on a different hue with changing understandings of human life and death, and of the appropriate status of women. When changed understandings result not from new technology but from social values and practices that lie behind legal questions, judicial problems may not be so different from those an interpreter of Sense and Sensibility meets. Nevertheless, sometimes the problems of applying old legal norms do differ radically from the portrayal of a self-contained literary text. When judges must apply legal rules to circumstances unfathomable to the law-makers, they face a serious extra difficulty not presented by a movie about Sense and Sensibility.

Yet another aspect makes individual legal rules less self-contained than literary works. When social values and practices change, so also does the corpus of legal norms. There is good reason to interpret particular legal rules of long standing so they fit reasonably well with other legal rules. When the Bill of Rights is interpreted now, the legal setting varies greatly from what it was two hundred years ago. Thus, any particular legal standard is surrounded by other, mostly contemporary, legal standards in a manner that is not quite true for a work of art.

B. Hypotheticals as a Response to Difficulties of Reconstruction

Novel circumstances threaten any strategy of reconstructing authors’ understandings. The difficulty is not just in guessing what people thought two hundred years ago, or in conceiving exactly how they would have understood anything. We know that the relevant people have not conceived some problems at all. We might repair to a level of abstract intentions; but if we want to use specific intentions about particular problems as a guide, we can rely only on hypothetical judgments—judgments about what people of an earlier era would have thought.

21. I do not wish to overstate the distinction between relatively self-contained literary works and old law that requires modern application. If, as Professor Warnke urges, we cannot understand a literary work apart from our historical condition, no text is completely self-contained; every text is open to changed understanding.

22. Similar difficulties, it should be noted, arise for members of different races, religions, ethnic groups, genders, and social classes in our own culture, not to mention children and adults in the same families. When the barriers to understanding exist among contemporaries, dialogue can reduce the problem.

23. Ronald Dworkin has emphasized the importance of abstract constitutional principles. See, e.g., RONALD DWORIN, A MATTER OF PRINCIPLE 33-71 (1985).
A judge carrying forward that endeavor might ask how the adopters of the Bill of Rights, or informed readers of the time, would have wanted or expected the First Amendment to apply to the electronic media. Such questions introduce three evident difficulties. First, the judge’s answer is likely to be much less confident than expert evaluations of what Jane Austen actually understood.

The second difficulty concerns the way a judge frames the critical question. Should he imagine a social world of 1791 in which radio, television, computers, and the Internet are suddenly introduced; or should he consider how these forms of electronic communication function in modern society? The latter question seems more apt. But if modern social conditions are introduced for novel technology, should not all constitutional problems be assessed against modern conditions? Were this done, judges would have to rely on hypothetical judgments of law-makers (or their contemporaries) for every constitutional issue.

Third, can a judge who asks what people of 1791 would have desired for unforeseen conditions really distinguish his judgment about that from his judgment about how the constitutional language would best apply? As Professor Warnke points out, when moderns decide how eighteenth-century people would evaluate issues in light of present social conditions, they are not making essentially factual determinations; they are making interpretive judgments.

C. The Need to Decide On a Best Approach

Judges, unlike literary interpreters, need to decide on a best approach. Legal cases involve claimants. Judges make practical decisions. Their objective in each case is to make the best practical decision according to relevant criteria. Perhaps Warnke is right that

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24. My own view is that what lawmakers or readers of the time would have believed to be correct applications of a rule is more relevant than what they wanted or expected; but that distinction is not important for this Essay. Another point that does not matter here is that insofar as the Bill of Rights applies to the states, the crucial lawmakers should be the nineteenth-century adopters of the Fourteenth Amendment, not the adopters of the original Bill of Rights. The term “adopters” here includes both those who proposed and those who ratified constitutional provisions.

25. This depends, I should add, on exactly what question is put about the electronic media. If the question is whether a system of governmental approval of all program content is appropriate, the answer is that the adopters would not have wanted that.

26. Of course, if the judge concludes that all the adopters were male chauvinist pigs, he might think they would not want the Equal Protection Clause to protect women. However, if judges assume that the lawmakers were wicked or benighted, they will doubt that they should be guided by hypothetical judgments based on these defects.

27. Warnke, supra note 1, at 401; see also WARNKE, supra note 2, at 28-29 (discussing intentionalist approaches to history and literary understanding).

28. Judges may not always recognize what approach they take, and the criteria may not be the same for each kind of case or legal norm. Further, judges who disagree on approaches may
there may be "different, equally legitimate interpretations of common principles," but judges cannot throw up their hands and declare that legal cases are ties. They cannot take the relaxed attitude one might find in the conductor of an orchestra using ancient instruments: "I think it's wonderful for people to hear Mozart on powerful and precise modern instruments, but the experience of hearing his work on the instruments for which he actually wrote is also rewarding." A judge can't say, "I think it's great for other judges to decide according to modern concerns; but it is also valuable to see how cases are decided according to law-makers' intentions, and that happens to be my pleasure and calling."

D. Is Attention to Contemporary Concerns Self-Evidently Best?

What I have said thus far about legal interpretation strongly supports most of Professor Warnke's ideas about legal interpretation. Attempts to reconstruct and present authors' understandings may not always be doomed as interpretive projects; but applications of old law to new circumstances and the extensive need for hypothetical judgments render the reconstructive endeavor even more difficult for old constitutional norms than it is for old literary works. Yet a further problem for law that does not exist for the authorial understanding of Jane Austen is the presence of multiple authors (or multiple understandings of contemporaneous readers). Is it not obvious that judges should apply norms as they relate to modern concerns? Perhaps our understanding may be increased by portrayals of literary work that emphasize what life looked like in the late eighteenth century, but can anyone suppose that our lives should be governed by norms reconstructed from that period in a highly unreliable fashion?

E. Allocation of Responsibilities

How might a critic resist this conclusion that judicial interpretation should be responsive to modern concerns in more or less the manner that Emma Thompson's interpretation of Sense and Sensibility is responsive to modern concerns? She might insist on an allocation of responsibilities that does not assign this function to judges. She might argue that the business of judges is to figure out what the law-makers intended (or readers then understood) in some narrow sense. Bringing

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29. Warnke, supra note 1, at 406. She talks about "forms of consensus and compromise that will try to synthesize legitimate interpretations" and, when that is impossible, "institutional procedures that . . . allow different legitimate voices to be heard." Id. at 412; see also WARNKE, supra note 2, at 161-62. Judges might be guided by those objectives, in part.

30. This problem does exist, however, for literary interpretation, if one tries to portray general cultural attitudes.
controlling constitutional and legislative norms in line with modern concerns is not their proper sphere. Even if she conceded to Warnke that answering hypothetical questions about what the law-makers would have wanted for altered conditions involves considerable interpretation, she might nevertheless believe that an original intent standard is desirable because it affords modern judges less latitude to act upon their own notions of right and good than do other approaches to judicial interpretation.

The most common defense of versions of original intent acknowledges that someone should keep legal norms in tune with modern concerns, but that someone is not a judge. More precisely, that someone is not a judge when dealing with statutory and constitutional rules. Keeping the norms up to date is the business of those who make statutes or amend constitutions. However difficult the task, judges should interpret in light of the specific understandings of the authors and adopters of legal rules and their contemporaneous readers; they should leave modernization to officials with that responsibility. General observations about hermeneutics cannot demonstrate that this position is mistaken.

F. The Drawbacks of Reconstruction Compared with the Advantages

Given the vagaries of hypothetical judgments and the open-ended quality of many constitutional provisions, an original intent jurisprudence actually restrains judges relatively little in constitutional interpretation. When one adds the difficulties of formal amendment of the federal Constitution, interpretation that attends to modern perspectives is more attractive than interpretation whose dominant guiding principle is original understanding. Original intent is a more serious alternative for the application of relatively recent statutes. I believe inquiries about intent should be significant in that endeavor, but original understanding should not be the exclusive mode of interpretation even then.

31. A person could take the position that insofar as modern concerns do not fit former ways of looking at things, so much the worse for modern concerns. Perhaps norms were issued in an inspired moment or series of moments, and our efforts now should be to recapture that way of understanding. This is a vision of many religious conservatives; and one could imagine a political analogue, although unless one introduces divine inspiration, the idea that any stage in history reflects all that is best for human life is rather implausible.

A more complex preference for older conceptions would rest on general conservatism. According to this view, “modern concerns” often are aberrations in wholesome human life; we do best if we cling to the past. Perhaps no period in history has an especially authoritative status, but the more we restrain our inclinations to rush headlong into an unconsidered future by tying ourselves to the past, the better we will do. Therefore, the more judges interpret in light of ancient conceptions, the better. If one were going to articulate a serious judicial philosophy based on inspired moments or overarching conservatism, one would need to develop these ideas much more fully.
Thus, I agree with Warnke’s fundamental judgments about the interpretation of legal texts, but such judgments depend partly on moral and political evaluation. Hermeneutic theory can instruct us that no one can reconstruct original understanding precisely, and it can warn us of the great difficulties in any such enterprise; but it cannot achieve resolution on its own.

III. CONSTITUTIONAL LAW AND PUBLIC DEBATE

Concentrating on the problem of abortion, Professor Warnke devotes the latter part of her Essay to public debate over constitutional principles. For the most part, she elides the underlying question whether women should be free to choose abortions with a constitutional right to that effect; but her main concern in this part of the Essay concerns public debate over fundamental issues, rather than constitutionality in any precise sense. I shall say a few words about that concern before addressing how her views relate to legal questions more strictly conceived.

A. Public Debate on Great and Controversial Issues

What Warnke says about public debate over great issues is right and important. Often, people overlook opportunities to learn from opponents in the shrill rejection of their views. Warnke’s placing of positions over abortion in the context of competing fabrics of interpretation is most instructive, and her call to see what adversaries may share and what they can teach each other is one that should be heeded. I also endorse her proposal that we may learn even from those whose views we believe are distorted by interest, status, or passion.

For me, Professor Warnke’s tone in recommending dialogue over abortion is unduly optimistic; I think certain conceptual steps contribute to this. Warnke says the differences are not over principle. When each side refers to liberty and the sanctity of life, Warnke takes these allusions at face value, as disagreements about the content of shared principles. But people frequently start with strong convictions about what is right and wrong and then seek labels for their views that will reinforce these narrower convictions and appeal to a wider public. What is superficially disagreement about shared principles may be mainly the co-opting of positive labels. Use

32. However, if she is suggesting that inquiries about original intent should be irrelevant to decision, I disagree. I think original intent, insofar as judges can ascertain it, is one criterion for decision. It should count more when a provision is relatively recent and when intent is clear.

33. Warnke, supra note 1, at 402.
by opponents of the same abstract principles is less encouraging for
dialogue than it seems.

"Pro-life" and "pro-choice" advocates may inhabit different
interpretive communities, but they also do disagree about the status
of the fetus. Professor Warnke looks to eventual agreement on a
moderate position; but any practical position will allow or prohibit
most abortions. Someone's views would have to shift radically before
the two sides could comfortably agree about that. The difference
over the status of the fetus also affects the quality of discussions. So
long as one side thinks the other supports a form of "murder"; and
the other side views the first as recommending oppression of women's
fundamental liberty over their destinies and their bodies, dialogue for
mutual enrichment is hard. The reciprocal learning Warnke
recommends is both desirable and possible, but the obstacles to it are
formidable.

B. Morality and Constitutionality

Warnke's treatment of conflicting views about abortion might lead
a reader to suppose that public debate and narrower legal debate of
problems should be in nearly identical terms and should eventuate in
the same resolutions. That is not necessarily so.

Discussion of the legal status of abortion takes place at least at
three levels. Are abortions (or most abortions) morally acceptable or
a serious moral wrong? Should the government prohibit (most)
abortions or leave women free to decide on their own? Should a
woman's ability to choose whether to have an abortion be considered
a constitutional right? Seeing these three questions as discrete reminds
us forcefully that allocating responsibilities is a crucial aspect of
law.

34. Conceivably, "pro-life" supporters might recognize that they are in a minority, and give
up, for the time being, an attempt to achieve extensive legal restrictions, without altering their
view about the morality of abortion.

35. In her book, see WARNKE, supra note 2, at 162, Warnke is sharply aware of the terms
of the debate.

36. Comparing artificial contraception with abortion makes that very clear. Professor
Warnke tells us that "pro-life advocates are as typically against artificial means of contraception
as they are against abortion since, in their view, such means undermine a reverence for the act
of sexual intercourse . . . ." Warnke, supra note 1, at 402. I am not quite sure who exactly
count as "advocates" in this sentence; many people think abortion is a grave wrong and that
artificial conception is fine, but perhaps these are not typical strident pro-life advocates. More
to the crucial point, most people who do regard both abortion and contraception as serious
wrongs regard abortion as a much greater wrong, because, in addition to its lack of reverence
for the procreative process, it involves the taking of innocent human life. Few modern
Americans who believe artificial contraception is wrong believe the state should prohibit it, and
the constitutional status of a right to use artificial contraception is relatively uncontroversial.
Abortion is different. Because pro-life advocates regard it as a form of murder, or something
close to that, they link its grave immorality to a conclusion that the state should forbid it.
Professor Warnke believes that an open and generous dialogue about abortion can teach people on both sides about liberty, the value of life, and responsibility. Since she envisions a legal standard that is fairly permissive about abortion, her proposed dialogue obviously concerns what law should do, as well as the moral choices people should make. But Warnke does not directly address whether discourse within the law, discourse about already guaranteed legal rights, should generally follow the outline of her public dialogue. If judges under the Fourteenth Amendment should resolve deep moral issues not addressed by specific constitutional texts, the answer may be yes. Even in that event, the legal discourse will contain elements, such as the importance of following precedents, that will be at most a very minor theme in public dialogue. More generally, interpretive strategies for constitutional safeguards (whether they are relatively specific, like the Privilege Against Self-Incrimination, or more open-ended, like the Due Process Clause of the Fourteenth Amendment) do not flow straightforwardly from general hermeneutic theory, from the contours of desirable public debate, or from the two in combination.

Interpretive strategies depend on judgments about roles and about the significance of textual formulations. Many law professors who believe states should not prohibit abortions also think Roe v. Wade was wrongly decided. Either they believe the Fourteenth Amendment, properly interpreted, simply does not cover such matters; or they believe a state legislature’s decision to protect incipient human life was an acceptable choice under the Constitution. What Professor Warnke says about the abortion debate does not come close to covering all the various legal possibilities. A reasonable person might conclude that dialogue about the place of abortion suggests some deep insights that should not be reflected in rights that are construed from our existing Constitution. More steps than Warnke acknowledges, some of them quite controversial, are needed to arrive at a position that discourse within constitutional law should closely track healthy public debate over any particular social problem.

Further, they conclude that no vague language in the present Constitution should have been interpreted to create a constitutional right, and they favor a constitutional amendment, if necessary, to reverse that conclusion.

38. On this view, the constitutional right to use contraceptive devices is also mistaken.
C. Standards of Legitimate Interpretation and Legal Interpretation

Professor Warnke’s focus on learning from public debate leads her to specific judgments and to standards of legitimate, or valid, interpretation that are vulnerable when one concentrates on legal interpretation. From the perspective of constitutional law, her specific judgment about affirmative action is not persuasive. To forestall misunderstanding, let me say that I have consistently favored many forms of affirmative action and have argued that the Supreme Court should have accepted even the reservation of a set number of places for members of disadvantaged groups that have been victims of injustice.39

Warnke doubts that attacks on affirmative action can constitute legitimate interpretations of equality; since they do not encompass equality of full participation, they fail the interpretive requirement of unity between part (the position on affirmative action) and whole (a defensible general notion of equality).40 An opponent of affirmative action might respond: “I do not deny that some programs of affirmative action have aided full participation for those who have suffered disadvantage and injustice, but many programs have helped those who don’t need help and have failed to help those who do need help. Classification by race and gender poisons the social atmosphere, creates resentment, and undermines even those who benefit but who do not believe they could not have made it ‘on their own.’ The country’s strong and wise liberal tradition favors race and gender neutrality, not race and gender preference; constitutional equality should be understood to require racial and gender ‘blindness’ on the part of government.” Although I strongly disagree with this position, I do not think it flunks some basic principle of how to interpret.

More subtle and interesting problems concern the status of two of Professor Warnke’s standards of interpretation: unity of part and whole, and illumination. Warnke says, “An interpretation of a text is at least presumptively illegitimate if it does not admit of a unity between part and whole.”41 This standard rings true for moral judgments and literary interpretation but what about constitutional and statutory law? Rules adopted over time by different lawmakers may not admit of much unity, and even simultaneously adopted rules may lack any coherent justification, except the need for political

40. See Warnke, supra note 1, at 410.
41. Id. at 409.
compromise. Our most striking historical example is the constitutional compromise over slavery, including the counting of three-fifths of slaves as persons for representation in the House of Representatives. When legal standards are interpreted, seeking unity of part and whole is definitely one appropriate guide. But it is far from the only guide, and not every legal interpretation that fails on this dimension is “presumptively illegitimate.”

Warnke’s proposal that a text should be interpreted to “be illuminating” is more perplexing. She suggests that interpreters should treat texts as “partner[s] in dialogue,” trying to understand them in such a way that they have “something to teach us.” I have reservations about this as a standard of legitimate interpretation for many nonlegal contexts. Considering a sexist understanding of a woman’s “no,” Warnke seems to focus on an individual whose interpretation fits his preconceived prejudices, concluding that such an interpretation is unilluminating for him and therefore illegitimate. Suppose A and B interpret an act (like the woman’s “no”) in exactly the same way. The interpretation fits A’s preset views, but not B’s. (B may be a radical feminist who has never supposed that any woman’s “no” might mean “yes.”) Can the same interpretation of the same act be legitimate for B because it teaches him, but not legitimate for A because he fails to learn? I am dubious; but perhaps Warnke means to emphasize illumination for most people in a culture (or large subgroup) rather than illumination for a particular individual interpreter.

Whatever her response to this quandary, my problems with her standard as it relates to law, including constitutional law, go deeper. Legal interpretations end up asserting that some legal norm applies, or does not apply. Since a practical consequence follows that could be otherwise, each legal interpretation teaches us something. But this simple teaching is trivial; and the idea that a technical legal provision is “a partner in dialogue” is strained. What is involved in many legal applications is very different from the teaching in Thompson’s portrayal of Sense and Sensibility. If Warnke intends this richer teaching as a criterion for legitimate legal interpretation, her position is hard to defend.

Many legal norms are highly technical, not meant to be illuminating. A debatable interpretation may teach us something about the rule involved, but that need not illuminate our lives in any

42. One might adopt a different tack—namely that the “unity” lies in the ability of lawmakers to adopt requirements (the parts), even when the parts may not fit well substantively with each other.

43. Warnke, supra note 1, at 411.
broader sense. Great constitutional decisions, like Brown v. Board of Education,\textsuperscript{44} do that, but many constitutional adjudications are fairly mundane applications of settled principles to concrete facts, e.g. the police did (or did not) have sufficient basis to believe in guilt to make an arrest and search consistent with the Search and Seizure Clause of the Fourth Amendment. Of course, an opinion in the case may say something educative about the Fourth Amendment; but broad educative value is a standard neither of a legitimate legal opinion nor of a legitimate legal decision.

IV. INTERPRETATION AND THE “NATURE OF THINGS”

Professor Warnke approvingly quotes Gadamer’s suggestions that the inevitably partial perspectives of people in history give them a glimpse of the “nature of the thing,”\textsuperscript{45} and that the combination of identity of text and changing interpretation are how we may understand Aristotle’s idea of natural law. These comments raise the question whether we should conceive of changing interpretations as being correct, or legitimate, in some transcultural sense, or should conclude regretfully that everybody’s sphere of evaluation is necessarily restricted to their own cultural presuppositions? In other words, how far might Professor Warnke’s hermeneutic approach to interpretation be compatible with a theory of natural law? This question concerns judicial development of the common law, as well as constitutional and statutory construction; it also bears on legislative choices with powerful moral content.

According to the tradition of natural law that has grown from Thomas Aquinas, moral truths can be discovered by use of human reason. People can discern at least basic moral standards in whatever historical and cultural settings they find themselves. The existence of common moral judgments among widely diverse people is taken as some evidence for natural law. Many believers in natural law regard certain forms of reasoning about moral questions as inherently persuasive. Relying on these forms of reasoning, they reach conclusions about controversial issues of morality, like homosexual acts and assisted suicide. Adherents typically suppose that a natural law approach is not only sound in its assertion of a universal morality discoverable by reason, but also useful for resolving troublesome moral and legal choices.

Philosophies of natural rights differ in critical respects from standard defenses of natural law, but they typically share belief in a

\textsuperscript{44} 347 U.S. 483 (1954).

\textsuperscript{45} Warnke, supra note 1, at 396.
transcultural reason and in the usefulness of the conclusions of that reason for resolving practical questions. Most of what follows in this essay applies to assertions of natural rights as well as claims of natural law, but I do not trace those implications.

Warnke and I agree that human understanding is substantially influenced by cultural background. What does that acknowledgement do to the plausibility and usefulness of natural law?

One might conceive of history and culture as imposing limits from which no one can escape. People may be able to learn from other cultures, but, on this vision, no morality or forms of moral reason are universal. Within the basic values of one's own culture, increases in understanding and resolutions of once thorny issues can take place. One might talk about a "natural law for a culture," or a "shifting natural law," without making any claim to universality. But it would be odd to talk about a moral "nature of things."

Professor Warnke's approving reference to a "nature of things" seems to suggest something more, the existence of moral and political truth that is universal, or that transcends many historical periods and cultures. I am unsure what Warnke believes about this. Although the Essay intimates the prospect of a universal nature of things, it does not develop a theory to account for that. In her book, Warnke considers claims of prominent theorists such as Jürgen Habermas, that political theory can transcend particular cultures. She apparently accepts the value of dialogue and the appropriateness of some constraints on dialogue as universal; she also believes that some interpretations of social meaning are illegitimate. But she is unconvinced by claims that substantive moral conclusions can escape the limits of culture.46 Someone might contend that belief in the universal value of constrained dialogue and belief in universal criteria of legitimate interpretation (such as unity of part and whole) themselves amount to a kind of belief in natural law; these may be what Warnke sees as the moral "nature of things." But I want to reflect briefly on how a hermeneutic approach to legal interpretation and moral understanding might link to a belief in a natural law that is more encompassing.47

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46. See WARNKE, supra note 2, at 87-164. She writes that hermeneutic political theory "no longer claims to be articulating universally valid principles of justice or principles grounded in a priori moral standards. This transformation means that significant differences in the principles that different hermeneuticists defend can no longer be understood as differences over universal principles of justice or over those principles that are uniquely well justified." Id. at 130. See also id. at 154-55, where Warnke sets out the ambitions of her political theory in a manner that summarizes how central the conditions of interpretive conversation are for her.

47. I treat these matters in somewhat greater length in Questions About the Place of Natural Law, in NATURAL LAW AND CONTEMPORARY PUBLIC POLICY (David F. Forte ed., forthcoming 1998).
One possibility is that our understanding is composed of some culturally limited and some transcultural elements; that at least when we compare our culture with other cultures, we can discern certain truths in a largely transcultural way. To take a simple nonmoral example, we can conclude that human beings need some clothing or shelter when they live in temperatures that are below the freezing point for water. Shifting to morality, we might learn that in every culture the intentional killing of innocent, full citizens is regarded as wrong. We could find reasons why any society and its members would fare badly if they did not accept this principle. We could then identify the immorality of such killing as included in a transcultural natural law.

A variation on the possibility of transcultural elements is that we always see even these elements in a culturally determined manner. Because any one moral concept is linked to a vast array of other concepts within a language and culture, we will understand “killing innocent people is wrong” in a slightly different way than do members of other cultures. One obvious reason is that the connotations of “innocent” for us may vary from how people of another culture take the word that translates most closely. Nonetheless, we are capable of perceiving some transcultural truths; and our explanations of these will be largely comprehensible to members of other cultures, albeit their understanding will never be precisely the same as ours. Thus, if we translate the question, “Is intentional killing of innocent people wrong?” the question may not strike members of other cultures in precisely the same way, but all will answer, “Yes, it is wrong.”

In a more subtle way than the notion of separate cultural and transcultural elements, this view also adopts the idea that we can make valid assertions of transcultural and transhistorical truth. On this view, which I hold, one can cling to belief in universal aspects of morality. We may be able to identify some transcultural elements that will be helpful in resolving practical questions, but we cannot be as confident as traditionalists have been in concluding that reasons about debatable issues that strike us as persuasive really have transcultural force.

One might envision transcultural truths in yet a different way. Various cultures might grope in their particular fashions toward truths that transcend cultures without anyone actually perceiving transcultural...

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48. See Warnke, supra note 2, at 6, 17. Since no two individuals in the same culture will understand all concepts in precisely the same way, no two people will share exactly the same understanding of any complex social idea. But two people within a culture will usually come much closer in understanding than people of different cultures.

49. I have in mind here different nuances about the significance of innocence, not radically different ideas about who counts as innocent.
tural elements with any degree of clarity. A premise that we are radically limited in our understanding by history and culture does not rule out the existence of some common moral truths. But if we think our reason cannot escape cultural limits even to a degree, what ground would we have to believe in common moral truths? One could still affirm transcultural moral truth on the basis of faith, but I do not see how one could suppose reason can establish it. In sum, a hermeneutic theorist can suppose that in morality “there is something like the nature of the thing” only if she relies on faith or does assume that reason can transcend culture to a significant degree.

What about usefulness? A view that transcultural elements are inextricable from culturally partial perspectives gravely compromises the likely utility of natural law. If cultural elements are always inseparable from what may be “the nature of things,” we must constantly wonder whether particular views are the product of parochial culture rather than some intuition or reason that transcends culture. When elements of morality seem to be products of domination or peculiar local factors, we may conclude that these elements do not reflect an underlying moral “nature of things.” But average people making moral decisions, and judges making legal ones, will ordinarily have to aim for what seems best, without worrying too much how far they are moved by transcultural truths as well as cultural ones. What happens to be within the range of transcultural truth will help influence judgment, but people will not be able to identify it as separate from more bounded presuppositions.

In summary, hermeneutic theory of the kind Warnke presents is not necessarily at odds with natural law, but some versions of hermeneutic theory do undermine the believability of natural law, and all versions suggest that its likely utility, as distinct from cultural premises, is less than traditionalists have long believed.

CONCLUSION

This essay has concentrated on the interpretation of legal texts. Although no one can recapture the past with precision, attention to the specific intentions of lawmakers is one possible method of interpretation. It is a method that might be given overarching importance, treated as irrelevant, or used in combination with other approaches. In suggesting the extent to which we are limited by history and culture, hermeneutic theory can reveal grave difficulties.

50. Of course, a culture like ours might dominantly assert the existence of a transcultural truth, but once people realized that all understanding depends on culture, why should they think the cultural premise of transcultural truth is really true, rather than a dispensable feature of a particular perspective?
with a jurisprudence of original intent; but that theory alone cannot settle what role intent should play in judicial decision. In particular, the notion that in some senses interpretation must be responsive to present concerns does not tell us how much attempted reconstruction of original intent should count for resolving modern legal issues. Political and moral judgments about the appropriate responsibilities of judges are needed before one can draw conclusions about that.

Although public debate on great constitutional issues will typically connect in vital ways with narrower legal analysis of the same issues, the two forms of discourse are not identical; and a desirable resolution about legality under the constitution is not necessarily a desirable outcome of broader public dialogue. In debates about abortion, for example, legal discourse attends more to questions of how very general constitutional language should be understood and what weight should be given to precedents than does broader public argument. Some insights that could emerge from deeper understanding of competing claims about abortion, such as the need to give “unwanted” newborns better care, might affect the lives of individuals and social policy, without influencing constitutional outcomes.

Not every interpretation of every text or social practice is “legitimate”; but each of the two standards Professor Warnke emphasizes is questionable in relation to law. Whatever may be true of literary interpretation, we should not expect each legitimate interpretation of law, even when explained in an opinion, to teach us something significant, to illuminate our lives. Nor should we expect each valid interpretation of law to challenge our preset opinions. In contrast to “illumination,” unity of whole and part definitely is a standard of legal interpretation; but courts are frequently in the position of accepting particular rules made by legislatures (and constitution makers) that do not fit easily with other aspects of the law, but have nonetheless been adopted by officials with the power to adopt them.

Does hermeneutic theory, if persuasive, undermine the grounds for believing in a common moral truth discoverable by reason, that is, natural law? This depends on how radically local historical and cultural elements determine understanding. One can believe that despite the strong influences of history and culture, people are able to grasp some moral truths with transcultural significance. This belief would allow one to embrace the idea of a natural law that reaches beyond the value and constraints of interpersonal dialogue. However, the more that fully transcultural truths are intertwined with culturally limited truths in our understanding, the harder it will be for us to be confident just which moral ideas are part of the natural law. Our confidence should be least when a moral issue is approached
differently in different cultures and is controversial within our own culture. It follows that a natural law of this kind, if viewed as distinct from the presuppositions of a particular culture, will have only modest usefulness for resolving troublesome moral and legal problems.